NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 14
Issue 1 *A SYMPOSIUM ON FINDING A PATH TO GENDER EQUALITY: LEGAL AND POLICY ISSUES RAISED BY ALL-FEMALE PUBLIC EDUCATION*

Article 18

1997

Gender Matters, Race Matters

Judith Resnick

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As the luncheon speaker, I was asked to take a step back from the specific issue of an all-girls school in New York City. Instead of focusing on the experiences of girls between the ages of ten and eighteen in middle and high schools, I was asked to speak about women over the age of twenty-one, in legal education and in law. The questions are several: What do we know about the experiences of women who go to law school? About women who go to court? About those who work in law firms?

The answers on one level are straightforward. A growing body of articles and essays provides a wealth of data offering some insights into the experiences of women in law schools. Students -- such as those who have enabled this symposium -- deserve a good deal of credit. Students have been the pioneers in creating journals about women in law and in bringing attention to the experiences of women in law schools.

For example, in the late 1980s, a group of about twenty women at Yale Law School felt themselves alienated. They thought that their experiences of law school differed from that of their male counterparts. They decided to do a small study to explore the dimensions of difference and to understand what they termed to be their relative "powerlessness."[1] What they did was try to keep track of who spoke in classes and what responses were elicited. What they reported was that women law students participated less than did men in class; that when women did speak, their comments were greeted with less than full attention; and that their points

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 Arthur Liman Professor of Law, Yale Law School. These remarks are related to a series of my essays, including *Asking About Gender in Courts*, 21 SIGNS 952 (Summer, 1996) and *'Naturally' Without Gender: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U.L. REV. 1782 (1991). My thanks to Hari Osofsky for able research assistance.

1. Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1300 (1988).

were ignored.[2]

The Yale student study has been followed by several others, including data reported in 1994 by Professors Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow, and Deborah Lee Stachel.[3] With the support of the dean of the University of Pennsylvania, the researchers examined the undergraduate records and law school admissions scores of women and men entering that law school.

The researchers concluded that the undergraduate academic profiles were basically identical, with equally well-credentialed women and men in the entering class. Gender did not distinguish them. The researchers then looked at the performance of law students once in law school. Although women and men students had been fungible on the "predicators" -- entering grades and LSAT scores -- women did not get as good grades as did the men. Rather, by the end of the first year, "men were three times more likely than women to be in the top ten percent of their law school class."[4] This study also found that women in their first year were more critical than men of the experience at law school, but by their third year, women had become less critical than were men.[5] The name of this article is *Becoming Gentlemen* and its argument is that, at least at the law school studied, legal education alienates women students in formal settings such as the large law school class, excludes women in various ways from informal means of learning, and the women who succeed do so by "becoming gentlemen." Not surprisingly, the

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2. I was fortunate during the 1996-97 academic year to be one of the subjects of a parallel study, undertaken by Professor Catherine Krupnick of Harvard's Education School, who attended first year classes at NYU's Law School where I visited. Catharine educated me about what she terms the geography of a classroom and about the interactive dynamics, both among students within one class and as students move from class to class.

3. *See* Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

4. *Id.* at 3.

5. *Id.*

recommendation is for legal education there -- and implicitly at many other law schools -- to change its modes.

If one genre of this work is to look at particular law schools and do what some social scientists might describe as a "case study," another is to look across different law schools in an effort to consider whether law school cultures vary. For example, in the late 1980s, Professor Taunya Banks sent surveys to students at fourteen law schools and garnered almost 2000 responses from law students.[6] Professor Banks found that more women than men perceive law school classrooms to be "alienating and hostile."[7] Women students reported lack of encouragement from their teachers (who were frequently men), hostility from their male peers, and generalized distress.

Such efforts to gather information come not only from law students and professors but also from the bar. In the winter of 1996, the American Bar Association's Commission on Women in the Profession released a report that concluded that "many women still experience debilitating instances of gender bias and discrimination in law schools."[8] Relying on the receipt of testimony about legal education from around the country, the report found that, for both students and teachers, gender remains an organizing principle of many people's experiences and sometimes of their success.

These studies are but a few of the many efforts underway addressing the role of gender in law schools and of law schools' role in making gender meaningful. The activities considered range from teacher

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6. *See* Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 SO. ILL. L.J. 527, 528 (1990) (describing the administration of surveys at four private and ten public law schools located in the East, the West, the South and North-central United States (response rates paralleled law school demographics, in that respondents were 60 percent male and 40 percent female at a time when women comprised about 42 percent of the entering class)).

7. *Id.* at 529.

8. ABA COMMISSION ON WOMEN, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION (Jan. 1996).

evaluations[9] and moot court to clinical programs and more traditional law classes.[10] The methodologies vary, from testimony and personal descriptions to quantitative work, such as that recently undertaken by the Law School Admissions Council[11] and currently underway by a consortium of law schools, all pursuing research to learn whether experiences reported in studies of any particular institution are borne out across different law schools.

As I report on these efforts to collect data, I need also note the limitations of the information gathered. I can tell you less than I would like about if and how experiences differ *among* women and men. Much of this literature uses the categories "men" and "women," and not categories that mark the intersections of gender, race, ethnicity, and class. Furthermore, in the few discussions that do turn to the question of people of color, the diversity within that category is often not explored; we know little about distinctive experiences either between women and men of color or among different communities clumped under the rubric "of color."

The absence of such data does not always stem from ignorance of the importance of more nuanced information, but is explained in part by the fact that, at least for quantitative work, the small numbers of people of color who are students and teachers in law schools make it difficult to have a sample size sufficient for conclusions about variations within and across the categories of gender and of racialized or ethnic minorities. Moreover, this picture is changing. Professor Amede Obiora has written a critical review of the problem of gender in legal education and the role

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9. *See* Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM (1996).

10. *See, e.g.*, Mari N. Morrison, *May it Please Whose Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49 (1995).

11. Ken Meyers, *Study of Gender Difference Finds 1-L Women Draw Lower Grades*, 17 NAT'L L.J. 1 (1995) (citing a study by Dr. Linda F. Wightman that found that gender is a variable of predictive value, in that women perform in law school less well than predicted by the LSATs).

that race and class plays in concepts like "silence" in the classroom or in assumptions about what is "proper" behavior for females.[12] Professor Banks has also reported that she is looking at the perceptions of Hispanic American and African American students to compare their experiences with those of white male law students.[13]

The growing data on women inside law schools is linked to an impressive body of data about women in the legal profession and specifically in courts. Having provided a snapshot of the kind of data emerging from law schools, my second task is to remind you of the rich set of materials discussing studies of gender, race, and ethnicity in courts. (I will not here go into the literature on gender in law firms, but urge you to read Professor Cynthia Fuchs Epstein's findings on women in practice here in New York City.[14])

Some history is in order. In the 1960s and 1970s, women and men concerned about women's rights found that some of the pain of discrimination came from the very places to which they brought claims--the courts. In an effort to educate judges about the discrimination that was occurring under their aegis, the Legal Defense and Education Fund of the National Organization of Women founded the "National Judicial Education Program" (NJEP), which has worked in cooperation with the National Association of Women Judges.[15] The issue was titled "Gender

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12. Amede Obiora, *Neither Here Nor There, of the Female in American Legal Education*, 1996 L. & SOC. INQUIRY 355.

13. Banks, *supra* note 6, at 535 (explaining that given the small numbers, women and men are included together).

14. *See* Cynthia Fuchs Epstein, Robert Saute, Bonnie Oglensky & Martha Gever, *Glass Ceilings and Open Doors: Women's Advance in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995).

15. *See* Norma Juliet Wikler, *On the Judicial Agenda for the 80's: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980) (as founding director of the NJEP, Dr. Wikler summarized the evidence of gender based stereotypes and of the new project to educate judges); Norma J. Wikler, *Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts*, 26 COURT REVIEW 6 (Fall, 1989) (history of founding of NJEP).

Bias in the Courts," and a principle mechanism for responding became the creation of "Gender Bias Task Forces."[16]

New Jersey led the way in 1982 when Chief Justice Robert N. Wilentz of that state's Supreme Court created the first such Task Force.[17] New Jersey also gets the credit for being first with a task force on "Minorities in the Courts." (And, in 1997, New Jersey's Supreme Court, now under the leadership of Chief Justice Debra Poritz, has pioneered again by forming a task force on gay and lesbians in courts.[18])

By 1988, the Chief Justices of all the state courts adopted a resolution calling for study of gender, racial, and ethnic bias.[19] By the spring of 1990, "task force activity [on gender was] underway in some thirty jurisdictions" in the United States.[20] In March of 1995, at the first National Conference of the Consortium on Racial and Ethnic Bias in the Courts, about twenty jurisdictions reported on their work on those issues.

During almost the first decade of the work, the 1980s, task forces on gender, race, and ethnic bias in the courts were exclusively the domain of state courts. Beginning in the 1990s, the federal courts began to take

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16. *See* Lynn Hecht Schafran, *Educating the Judiciary about Gender Bias*, 9 WOMEN'S RTS. L. REP. 109, 124 (1986) (as Executive Director of the NJEP, describing its "dream" to be "a task force in every state").

17. *See* FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (June, 1984) at 4; *see also* Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 281 (1987).

18. The Supreme Court's Task Force on Gay and Lesbian Issues is co-chaired by the Hon. B. Thomas Bowen and by Elizabeth Zuckerman and is scheduled to report in 1998. *See* Letter from the Chief Justice, Debra Poritz of June 30, 1997 (on file with the author).

19. *See* 26 S. CT. REV. 5 (1989). In 1993, the Conference of Chief Justices reaffirmed this position and called for implementation of reforms. Conference of Chief Justices, Resolution Urging Further Efforts for Equal Treatment of All Persons (adopted Jan. 28, 1993) (available from the National Center for State Courts).

20. Betty Weinberg Ellerin, Chair of the National Task Force on Gender Bias in the Courts of the National Association of Women Judges, ANNUAL REPORT TO THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF WOMEN JUDGES (September 4, 1990) (on file with author). *See generally* Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237 (1989) (reviewing the achievements).

up the question of gender. In 1992, the Ninth Circuit became the first within the federal system to issue a report on this topic.[21] As of 1996, the Ninth Circuit and the District of Columbia had published reports, and during 1997, reports are to be published by the First, Second, Third, Eighth, and Eleventh Circuits.[22]

Moving from the history of the projects, I turn now to a very brief survey of their findings. Typically, task forces review an array of topics, including the application of substantive legal doctrine (issues such as criminal law, women as victims of domestic violence, family law, immigration, bankruptcy, and federal benefits); the court as a workspace (with a focus on courtroom interactions and dynamics); women and men as professionals in and staff of the courts (with data on demographics); and the role of the court as an institution (considering issues involving courts as employers and as institutions with authority to make appointments and the like).

The conclusions from the more than 40 reports published by task forces on gender, race, and ethnicity prompt the title for the talk: gender matters, race matters. For example, New York found in 1986 that:

> [w]omen uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.[23]

Connecticut concluded in 1991 that:

> women are treated differently from men in the justice

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21. *See* THE NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: FINAL REPORT (July 1993), republished at 67 SO. CAL. L. REV. 727 (1994) [hereinafter NINTH CIRCUIT, THE EFFECTS OF GENDER].

22. The Judicial Conference of the United States, the policy-making arm of the federal judiciary, has endorsed these efforts as has Congress in the Violence Against Women Act of 1994, Pub. L. No. 103-332, Title IV, Sept. 13, 1994, 108 Stat. 1902. Summaries of the activities can be found in Judith Resnik, *Activities and Publications related to Gender, Race, and Ethnicity in the Courts* (Aug. 1997) (on file with the author).

23. NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, republished at 15 FORDHAM URBAN L.J. 11, 17-18 (1986).

> system and, because of it, many suffer from unfairness, embarrassment, emotional pain, professional deprivation and economic hardship.[24]

In January of 1997, Tennessee's task force concluded that:

> gender bias in Tennessee's legal system prevents the participation of women therein. While many corrective measures have been taken . . . evidence of gender bias persists.[25]

From states as disparate as California, Georgia, Kentucky, Maryland, and Minnesota, one learns that women seeking redress for violence within their homes (misnamed, in my view, "domestic" violence) are often either blamed, accused of provoking their attacks, treated as if the experiences were trivial, or disbelieved.[26] More than twenty reports describe that

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24. REPORT OF THE CONNECTICUT TASK FORCE ON GENDER, JUSTICE AND THE COURTS 12 (1991); *see also* REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 42 (1990) (finding that "gender bias permeates Florida's legal system today"); The 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS 3, 5, 15, 16, 25, 28 (1990) (finding that women are "at a disadvantage during divorce settlement negotiations;" rape victims are discouraged from prosecuting "by the treatment they receive from the system;" and while there are not plentiful examples of "overt discrimination," "evidence that more subtle forms of bias persist"); MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, at iii-iv (1989) ("women's negative experiences cover the range from the aggravating to the life-threatening"); WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, GENDER & JUSTICE IN THE COURTS, at xvi (1989) ("[G]ender discrimination exists and can negatively impact judicial decision making and affect the outcome of litigation.").

25. REPORT OF THE COMMISSION ON GENDER FAIRNESS, at 1 (submitted to The Tennessee Supreme Court Jan. 15, 1997).

26. *See* JUDICIAL COUNCIL OF CALIFORNIA, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS, THE DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS at 4-5 (1990); GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMM'N ON GENDER BIAS IN THE JUDICIAL SYSTEM 19-21 (1991); EQUAL JUSTICE FOR WOMEN AND MEN, KENTUCKY TASK FORCE ON GENDER FAIRNESS IN THE COURTS 28 (1992); REPORT OF THE SPECIAL JOINT COMM. ON

women as witnesses sometimes face special hurdles; their credibility can be readily questioned, their claims of injury undervalued.[27]

When the focus is on race and ethnicity, the reports are similarly distressing. In 1989, Michigan found that:

> there is evidence that bias does occur with disturbing frequency at every level of the legal profession and court system.[28]

The State of Washington's report concluded that:

> minorities . . . [do not] trust the court system to resolve their disputes or administer justice even-handedly.[29]

In 1991, New York's task force reported that:

> the perception [is] that minorities are stripped of their human dignity, their individuality and their identity in their encounters with the court system.[30]

Criminal justice is a place of special concern, with reports on inequity in

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GENDER BIAS IN THE COURTS 2-5 (1989); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 872-77 (1989); *see also* THE FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 119 (District of Columbia, 1992) ("cross-examination of victims tends to be more hostile in sexual assault cases than in other assault cases").

27. Almost all of the jurisdictions that have published gender bias task force reports address questions of credibility as parts of discussions of domestic violence, sexual assault, courtroom interaction, or of rights sought by women litigants under employment and federal benefits law. Many of the reports detail the specific problems faced by women testifying about sexual aggression.

28. FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS 2 (1989) [hereinafter MICHIGAN RACE/ETHNIC REPORT]; *see also* NEW JERSEY TASK FORCE ON MINORITY CONCERNS, FINAL REPORT, 1 NEW J. LAWYER 1225, 1230 (Aug. 10, 1992) ("Minority litigants, minority witnesses, and minority attorneys are subjected to racial and ethnic slights from all levels of court and security personnel--from the bailiff to the bench.").

29. WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE, WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE FINAL REPORT, at xxi-xxii (1990).

30. 2 REPORT OF THE NEW YORK STATE JUDICIAL COMM'N ON MINORITIES 150-51 (1991) (published in five volumes) [hereinafter NEW YORK REPORT ON MINORITIES].

sentencing.[31] Further, language may also be a barrier. As the 1991 Florida report put it:

> evidence in Florida suggests that the rights of non-English speaking defendants are systematically being compromised due to the lack of trained, qualified court interpreters.[32]

In short, just as studies of law school find that gender organizes experiences in important ways, so do studies of courts tell us that gender has more predictive value than we had hoped. And while both women and men have "gender," the pains of gender are not evenly distributed, but fall disproportionately on women. And, just as the studies of law schools are thin on the experiences of racialized minorities and ethnicity but thicker on descriptions of gender, so too are the studies of courts similarly tilted. More reports exist about the category "women" than the category "race and ethnicity." And, again, the picture is changing, as work on gender and work on race and ethnicity begin to expand to consider the intersections and to explore experiences marked by gender, race, and ethnicity.

Let me use one illustration from the work of the federal task force commissioned by the D.C. Circuit.[33] 1700 attorneys responded to a questionnaire sent by the task force in which they were asked whether, during the past five years, federal judges had either questioned their status as lawyers or assumed that they were not lawyers. The report tells us that

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31. 1 NEW YORK REPORT ON MINORITIES, *supra* note 30, at 43; *see also* ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS 27-36 (1974-1976) (stating that Blacks received higher sentences in several categories of cases); INTERIM REPORT OF THE ALASKA JUDICIAL COUNCIL ON FINDINGS OF APPARENT RACIAL DISPARITY IN SENTENCING 54 (1979) (reporting that race of Blacks and Native Alaskans is a factor in denial of probation).

32. 2 REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMM'N: "WHERE THE INJURED FLY FOR JUSTICE," at viii (1991).

33. *See Report of the Special Committee on Gender to the Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit*, 84 GEO. L.J. 1657 (1996).

one percent of the white men said that a judge had done so to them. About ten percent of both men of color and of white women responded a judge had made that mistake, and thirty-three percent of the women of color said they had experienced this problem.[34] With this one vignette, we are reminded of the importance of not assuming that the experiences of those in the categories women and men are uniform. An aggregate statement -- twelve percent of the women and two percent of men have had this experience -- distorts important variations. Not all "men" nor all "women" have the same experiences, nor do all those "of color" have the same experiences.

One other point about the literature on experiences of women and men of all colors in law schools and in courts is important to keep in mind. A leit motif of this literature is that the relevance of gender is not reported equally by men and by women. Similarly, the relevance of race is not reported equally by those who fall within the category "majority" and those who fall within the rubric of "minority." In theory, variables such as age and role (judge/lawyer, teacher/student) might be critical, but in almost all of the quantitative studies, gender and race are the key. Here let me use an example from the Ninth Circuit study; I served as a member of that task force. From male lawyers, in small and large firms, public and private, young or old, we learned that they perceived gender to be either irrelevant or rarely relevant to case assignment, promotion, hiring, and selection for committees. Similarly, from the more than eighty percent of the judges who responded, male judges reported that gender was not relevant to

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34. *See id.* at 1743 (stating that nine percent of white women, nine to ten percent of men of color, thirty-three percent of women of color, and one percent of white men so reported); *see also* MASSACHUSETTS SUPREME COURT COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS, FINAL REPORT OF THE MASSACHUSETTS SUPREME COURT COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS: EQUAL JUSTICE: ELIMINATING BARRIERS 3 (1994) (discussing as one of the factors leading to the creation of the task force was an event, in 1988, when two court officers "mistook" an African American Assistant Attorney General for a "defendant and attempted to bar him, in an inappropriate manner, from gaining access to a part of the courtroom that he was entitled to enter").

much around them.

In contrast, women lawyers (whether working in a big or small firm, public or private practice) and women judges (whether trial, appellate, administrative, magistrate, or bankruptcy), whether young (here defined as under forty) or old (here defined as over forty) perceived gender to be relevant sometimes, often, or on occasion. In other words, while men report mostly that gender has little relevance, women report mostly that gender has some relevance -- not all the time, but not never. Moreover, the reports of gender's relevance, coming from women, are that gender can work to their detriment, in both process and outcome.[35]

This pattern of very different perceptions and perspectives is mirrored in the reports on gender and on race and ethnicity. People of color report that color matters in courts and law firms; people whose color is white generally report that color makes little or no difference.[36]

To summarize, through individual, independent efforts and through formal commissions organized by bar associations and by courts, researchers have asked about the relationships among gender, race, ethnicity, and the processes of law. Through these efforts, women's voices -- repeated, collected, aggregated, and moving from jurisdiction to jurisdiction -- have made a space for claims that gender matters, and that it matters to women's detriment, in places such as law schools and courts in which gender is supposed not to matter -- in the sense of organizing either access, participation, or outcomes.

Moreover, in these last few years, the concepts of gender and race have come to be understood as interactive rather than distinctive categories. While the phrase "women and minorities" is oft-repeated in law, participants in law are coming to understand that "women" include those of all colors and that "minorities" include those of both genders.

In addition to providing data mapping the experiences of women

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35. *See* NINTH CIRCUIT, THE EFFECTS OF GENDER, *supra* note 21, at 963-1001.

36. *See* MICHIGAN RACE/ETHNIC REPORT, *supra* note 28, at 13 (describing "majority males" as the least likely to perceive bias exists).

and men in their multiplicities within law, the studies have formed the basis for change. Some "progress" -- measured in terms such as appointments to faculties and to the bench; integration of committees; and programs to educate law students, law teachers, judges and lawyers about stereotypic patterns -- has occurred. Bias is now a topic of judicial conferences, of lawyers' meetings, and of private discussions.[37] Continuing legal education includes programs on race, gender, and ethnicity. Courts have developed handbooks on equal treatment and offer training programs on the problems of victims of violence.[38]

Further, the topic of gender, race, and ethnic bias is making its way not only into education programs but also into rules. Sexual harassment policies have been developed[39] and canons of ethics rewritten.[40] A body of law is emerging as well. In a few reported cases,

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37. See, for example, the resolution enacted unanimously by the officers of the Essex County Bar Association of New Jersey, calling for (inter alia) a "permanent task force" on issues of racial/ethnic discrimination in the courts; a revised bail system "free of bias [that] . . . gives minimum weight to economic criteria because such factors generally impact unfairly upon racial minorities;" "cautionary jury instructions relative to . . . cross-racial identification"; the "establishment of a non-discriminatory bar examination;" and a requirement that judges read and post statements "opposing racial and ethnic bias in the courts." Memorandum of Robert D. Lipscher to Hon. Theodore Z. Davis, *Comments on the Final Report of the Supreme Court Task Force on Minority Concerns* 3-4 (Dec. 28, 1992) (on file with the author).

38. *See* FIVE YEAR REPORT OF THE NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS 27-31 (1991). *See generally* Vicki C. Jackson, *Gender Bias in the Courts, What Can Judges Do?*, 81 JUDICATURE 15 (1997).

39. *See, e.g.*, United States District Court, District of Minnesota, Sexual Harassment Policy 1 (July 1996) (prohibiting harassment by a "judicial officer, a court official, an employee of the court or a related governmental agency"); Western District of Washington, United States District Court and Bankruptcy Courts, Sexual Harassment Policy 1 (adopted February, 1993) (applicable to "a member of the District or Bankruptcy Clerk's Offices, Probation Office, Pretrial Services Office, or judicial staff" as well as to "any non-staff person") (on file with the author).

40. *See, e.g., Mich. Bar Approves Antibias Rules for Codes of Conduct*, 15 BAR LEADER, Nov.-Dec., 1990, at 4-5 (state bar approved new rules that provide that lawyers and judges not "engage in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin and shall prohibit staff and agents subject to the lawyer's direction and control from doing so."); American Bar Association, Model Code of Judicial

lawyers have been sanctioned for making racist and sexist remarks in court or in depositions.[41] Convictions and judgments have been reversed on findings that during a trial, a judge or jury was prejudiced against women and/or people of color. One example -- coming from a case decided in South Carolina -- details both the problem and a court's response.

A man named Beondi Clifford Pace was on trial for grand larceny, accused of theft of a pair of tennis shoes from a sports store. His female defense lawyer asked a question about a prosecution witness's criminal record. The trial judge sustained the government's objection and, out of hearing of jury, told her that the "fishing expedition" she was on was improper.[42] During that exchange, again off the record, the trial judge called the defense lawyer a "nice girl" and a "pretty girl."[43] Later, the trial judge told the jury that the question was not proper but rather a "pitch in the dark," and that she [the defense counsel] had "apologized." He went on:

> I hate to fuss at a pretty girl. . . a pretty girl I hate to fuss. But it was a kind of below the belt shot. But she was doing the best, she thought. But anyhow, as she gains experience--if they don't give it to her all she does have to do is ask me, and I certainly will. . . . So don't hold it against her. She is a nice girl.[44]

On appeal, the intermediate appellate court commented that the remarks were suboptimal: "[i]t is doubtful a trial judge would consciously address a male attorney as a `nice boy' or a `handsome boy.'"[45] Further, "gender has no place in determining the standing of members of the legal

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Conduct Canon 2(C) (1990) ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.").

41. *See* Jackson, *supra* note 38.

42. State v. Pace, 425 S.E. 2d 73, 75 (S.C. App. 1992).

43. *Id.*

44. *Id.* at 75-76.

45. *Id.* at 76.

profession. Female attorneys should not be addressed by any court in a manner which belittles them or intimates to them or others that they are viewed differently by the court."[46] It was not "prejudicial" error, however, so the defendant Pace lost on the merits.[47]

In contrast, the Supreme Court of South Carolina reversed and required a new trial.[48] The Court reasoned that, by impugning the credibility of counsel, the trial judge had hurt the defense's alibi; the trial judge had "undermined counsel's ability to effectively represent her client."[49] South Carolina's Supreme Court also excused the failure of counsel to object. In its view, given "the tone and tenor of the trial judge's remarks," such objections would have been "futile."[50]

Hence, this symposium, about single sex education in schools, comes at a time when concerns about the education and work of women in law are plainly in focus. I began my comments by asking: What do we know about women in law schools and working in law? I suggested that, at one level, the answers were straightforward: Because of enormous and sustained work across the United States, we are beginning to know a lot. Some celebration is in order, for a measure of success can fairly be claimed. Gender, race, ethnicity (and to a much lesser extent, class and sexual orientation) are on educational agendas, on rulemaking agendas, and in the law. One might fairly tell the story of the last fifteen years as filled with substantial progress, in which issues once considered of little interest are now not only in view, but also becoming integrated into programs of education and into rules of law.

Yet another way to answer my opening questions exists, one that is less straightforward, less optimistic, and more plainly linked to the subject matter of this symposium, single-sex education and the question

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46. *Id.*
47. *Id.*
48. *See* State v. Pace, 447 S.E. 2d 186 (S.C. 1994).
49. *Id.* at 187.
50. *Id.*

of the Young Leadership Institute for Girls, described in the press as the "all girls school in East Harlem."[51] While one may rightly celebrate fifteen years of hard work and various measures of success, this conference demonstrates that we are but at the beginning of the conversation, and not anywhere near knowing enough or sorting out all that has been learned.

A good deal of the work thus far -- on gender, race, and ethnicity in law schools and in courts -- has been the easy part. Please do not hear me as saying that the work has been "easy" in terms of energy, commitment, effort, or pain. The last two decades of achievements are the results of a huge amount of effort. Painstaking, labor-intensive work generated the materials to which I have adverted. Further, those who have undertaken this work have often been met with anger and, upon occasion, retaliation. Some have tried to stop these projects, even arguing that such work undermines the independence of the judiciary.[52]

But what is, in retrospect, "easy" is one of the underlying messages. Over the past fifteen years, a story of absence has been documented. What has been learned through all the materials I have described is that most women of all colors and men of color are in small numbers on most judiciaries, on many law school faculties, and in many law schools' student bodies. The story that emerges is one of exclusion, and that kind of story is a relatively easy one to tell. For example, once the task forces collectively pushed the demography of the judiciary into plain view and the predominance of maleness and whiteness came to be seen, the remedial response of diversifying that work-force also became plain.

It is not that the struggle for what Judge Leon Higginbotham terms "judicial pluralism"[53] has been won or that "affirmative action" efforts are

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51. *See, e.g.*, Jacques Steinberg, *Crew Says No to Compromise on All-Girls Middle School*, N.Y. TIMES, Sept. 25, 1997, at B3; Jacques Steinberg, *At a New School, No Boys, Less Fussing, and a Freer Spirit*, N.Y. TIMES, Feb. 1, 1997, at A3.

52. *See* Lawrence Silberman, *Political Correctness Rebuffed*, 19 HARV. J.L. & PUB. POL'Y 759 (1996) (reprinted from a speech delivered to the Federalist Society).

53. Leon A. Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993).

popular, but rather that some success has been achieved in making implausible overt hostility to pluralism. Whether from the left or the right, political parties speak of the need for such inclusion and prominently display individuals of both sexes and of a variety of races and ethnicities (less frequently of differing sexual orientations) as emblems of their commitment to inclusion. Thus, and again in retrospect, cases about overt exclusion of women -- such as the VMI and Citadel litigations -- are "easy."[54] Absolute bars to women's participation in the social and political life of the community are no longer acceptable. But as the debate about affirmative action so plainly indicates, pulling down old barriers under a banner of inclusion is a goal very different from either diversification or transformation. Inclusion of "others" within the current framework may not entail acknowledgement that those others have different experiences or visions, requiring more than replication. The complicated questions are not whether to let women into VMI or the Citadel -- or to law schools and practice -- but what to do once women are there. If "knob" hair cuts are de rigueur for the boy plebs, must women -- for whom a shorn head is a marker of shame -- have the same haircut? And, once the issue is raised, what about the orthodox Jewish man who attends a school such as VMI? What happens to rules about head shaving when women are included and when men of diverse racialized, ethnic, and religious backgrounds are identified?

While discussions have moved beyond a conception of women and men as unitary categories and begun to embrace the concept of "intersectionality" (that we are all raced, gendered, classed, and identified by a range of characteristics of varying saliency depending on the context), we have neither faced nor resolved the painful conflicts everyday more apparent. Marking intersections does not instruct us on how to negotiate them, nor permit escape from evidence that conflicts of race, ethnicity, class, and gender criss-cross those very lines.

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54. See Virginia v. United States, 116 S. Ct. 2264 (1996); Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995), *cert. denied* 116 S. Ct. 331.

That is why the "all girls school of East Harlem" is the hard case. Here we are -- without ready escape -- face to face with the relationships among class, race, ethnicity, gender, and the barriers in society, and here is where people of good will, hoping to make something better, battle about how to proceed.